



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2004

Mr. Robert R. Ray  
Assistant City Attorney  
City of Longview  
P. O. Box 1952  
Longview, Texas 75606-1952

OR2004-10040

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 214064.

The City of Longview (the "city") received a request for certain e-mails. You claim that portions of the requested information are excepted from disclosure pursuant to sections 552.101, 552.109, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that portions of the submitted information that you have marked are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.<sup>1</sup> We note that the Texas courts have recognized the common-law informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The common-law informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The common-law informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See Gov't Code* § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law informer's privilege.

officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). However, the report must be of a violation of a criminal or civil statute or law. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The common-law informer’s privilege excepts an informer’s statement only to the extent necessary to protect the informer’s identity. See Open Records Decision No. 549 at 5 (1990).

You explain that this particular marked information reveals the identities of individuals who reported alleged criminal violations of various sections of the city’s code to the city’s Environmental Health Division, the division responsible for the enforcement of these code sections. You indicate that such alleged violations can result in civil and/or criminal fines being imposed on those responsible for the violations. You also indicate that none of the individuals who are the subjects of the alleged violations know the identities of those who reported the alleged violations to the city. Based on your arguments and our review of this particular marked information, we agree that the city may withhold this information pursuant to section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

You also claim that portions of the submitted information that you have marked are excepted from disclosure pursuant to section 552.109 of the Government Code. Section 552.109 excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. We note that this office has held that the test to be applied to information under section 552.109 is the same as the test adopted in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), for information that is protected from disclosure by the common-law right to privacy as incorporated into section 552.101 of the Government Code.<sup>2</sup> Accordingly, we will collectively address your privacy claims under sections 552.101 and 552.109 of the Government Code.

Information must be withheld under section 552.101 in conjunction with the common-law right to privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found.*, 540 S.W.2d at 685. Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information are also private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987)

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<sup>2</sup> Section 552.101 also encompasses information that is protected from disclosure by the common-law right to privacy. See Gov’t § 552.101.

(prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure).

Based on your arguments and our review of this particular marked information, we find that some of this information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, we conclude that the city must withhold some of this particular information pursuant to sections 552.101 and 552.109 of the Government Code in conjunction with the common-law right to privacy. However, we also find that some of this particular marked information is not protected from disclosure by the common-law right to privacy and, thus, may not be withheld from the requestor under either section 552.101 or section 552.109 of the Government Code. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Accordingly, we also conclude that the city must release to the requestor the portions of this particular information that we have marked for release.

In addition, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.117 of the Government Code. We note that section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests that the information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). The determination of whether a particular item of information is protected from disclosure by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 for the information prior to the date that the city received this request. The city may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election under section 552.024 to keep the information confidential. Accordingly, we conclude that to the extent that the

information that we have marked under section 552.117(a)(1) is associated with an individual who requested confidentiality for the information prior to the date that the city received this request, the city must withhold the information pursuant to section 552.117(a)(1) of the Government Code.

Finally, you claim that some e-mail addresses that you have marked within the submitted information are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its disclosure. The types of e-mail addresses listed in

section 552.137(c) may not be withheld under this section. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Based on your representations and our review of these addresses, we agree that they are excepted from disclosure pursuant to section 552.137(a). Accordingly, we conclude that the city must withhold these e-mail addresses pursuant to section 552.137, unless the individuals to whom they belong have affirmatively consented to their disclosure. However, as you acknowledge, the remaining e-mail addresses that you have marked are associated with individuals who have consented to the disclosure of the addresses. Accordingly, we also conclude that the city may not withhold these particular e-mail addresses under section 552.137 of the Government Code. Consequently, the city must release to the requestor the e-mail addresses that we have marked for release.

In summary, the city may withhold the information that you have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city must withhold some of the information that you have marked pursuant to sections 552.101 and 552.109 of the Government Code in conjunction with the common-law right to privacy. To the extent that the information that we have marked under section 552.117(a)(1) is associated with an individual who requested confidentiality for the information prior to the date that the city received this request, the city must withhold the information pursuant to section 552.117(a)(1) of the Government Code. With the exception of the e-mail addresses that you have marked, the disclosure of which you acknowledge has been consented to by the individuals to whom they belong, the city must withhold the e-mail addresses that you have marked pursuant to section 552.137 of the Government Code, unless the individuals to whom they belong have affirmatively consented to their disclosure. The city must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/krl

Ref: ID# 214064

Enc. Marked documents

c: Mr. Mitch Motley  
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(w/o enclosures)